Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

ROBERT LLOYD MORROW,

Petitioner,

and THE CHEROKEE NATION,

Plaintiff-Intervenor,

v.

THE HONORABLE DAVID WINSLOW Judge of the District Court of Tulsa County, State of Oklahoma, JOHN AND JANE DOE prospective adoptive parents,

Respondents.

and

CAROL DERONE GRANT,

Respondent-Intervenor.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Robert Lloyd Morrow filed an action pursuant to 28 U.S.C. § 1331 and 42 U.S.C. § 1983 alleging that the respondent state court judge and prospective adoptive parents failed to comply with the Indian Child Welfare Act, 25 U.S.C. § 1901 et seq., in a pending adoption. The federal district court denied relief. On appeal, the Tenth Circuit in a 2-1 decision, sua sponte, held that the federal district court should abstain from exercising jurisdiction of a collateral attack against an ongoing state adoption under the rationale of *Younger v. Harris,* 401 U.S. 37 (1971).

The questions presented here are:

May the appellate court, sua sponte, raise the abstention doctrine?

Should the federal district court abstain from hearing collateral attacks of ongoing state adoption proceedings where violations of the Indian Child Welfare Act are alleged?

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PETITION FOR WRIT OF CERTIORARI

Robert Lloyd Morrow respectfully prays that a writ of certiorari issue to review the judgement and opinion of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on August 23, 1996. This request is made to resolve important questions of federal law regarding application of 25 U.S.C. § 1914 that have not been, but should be, settled by this Court and to resolve the conflict regarding invocation of the abstention doctrine, sua sponte, between the Tenth Circuit and the First, Third, Sixth, and Ninth Circuit Courts of Appeals.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit that gives rise to this petition was published by order of the Tenth Circuit. 94 F.3d 1386 (10th Cir. 1996). It is reprinted in Appendix A hereto ("App.A") at page A-1. By order filed October 2, 1996, the Tenth Circuit denied the petition for rehearing and suggestion for rehearing en banc by a vote of 6-6. App. B.

JURISDICTION

On July 31, 1995, the United States District Court for the Northern District of Oklahoma entered judgement against Robert Lloyd Morrow and filed its order with findings of fact and conclusions of law. On August 30, 1995, Morrow timely appealed to the Tenth Circuit which in a 2-1 decision rendered August 23, 1996, Chief Judge

Seymour dissenting, invoked, sua sponte, the doctrine of abstention, vacated the district court's judgement and remanded to the district court with directions to abstain.

On October 2, 1996, the Tenth Circuit denied Morrow's timely-filed motion for rehearing and suggestion for rehearing en banc. Pursuant to Supreme Court Rule 13.1, the petition has been filed within 90 days of the denial of rehearing.

STATUTES INVOLVED IN THIS CASE

Section 104 of the Indian Child Welfare Act, 25 U.S.C. § 1914, provides:

Any Indian child who is the subject of any action for foster case placement or termination of parental rights under State law, any parent or Indian custodian from whose custody such child was removed, and the Indian child's tribe may petition any court of competent jurisdiction to invalidate such action upon a showing that such action violated any provision of sections 1911, 1912, and 1913 of this title.

STATEMENT OF THE CASE

The district court denied Morrow relief under his 42 U.S.C. § 1983 petition who alleged violations of the Indian Child Welfare Act, 25 U.S.C. §§ 1901, 1912, by the state district court in a contested adoption of his natural child, In Re: CMG J-94-267 in the District Court of Tulsa County. The district court found that the child was an

"Indian child" as defined by 25 U.S.C. § 1903(4) and Morrow was an "Indian" as defined by 25 U.S.C. § 1903(3). The child was placed at birth by a nontribal private adoption agency. Morrow invoked the protections of 25 U.S.C. § 1914 praying that the district court invalidate the state adoption or require the state court to comply with and enforce the Indian Child Welfare Act.

On appeal, the Tenth Circuit, sua sponte, invoked the doctrine of abstention, and remanded the case to the district court with instructions to abstain.

The Tenth Circuit decided that it could consider the doctrine of abstention, sua sponte, after analyzing conflicting cases from the First, Third, Sixth, and Ninth Circuits.[1]

The Tenth Circuit then addressed whether the abstention doctrine should be invoked and held:

> While § 1914 grants "any court of competent jurisdiction," and thus a federal as well as state court, authority to consider a challenge to foster care placements and terminations of parental rights, we do not believe the preemptive federal collateral attacks, such as Morrow's, are what Congress intended to permit in § 1914. App. A at 20a.

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[1] *Shannon v. Telco Communications, Inc.*, 824 F.2d 150, 151-2 (1st Cir. 1987); *Winston v. Children and Youth Services*, 948 F.2d 1380 (3rd Cir. 1991); *Universal Amusement Co. v. Vance*, 587 F.2d 159, 163 n.6 (6th Cir. 1978); *Walnut Properties, Inc. v. City of Whittier*, 861 F.2d 1102, 1106 (9th Cir. 1988).

Morrow's petition for rehearing with suggestion for rehearing en banc was denied.

REASONS FOR GRANTING THE WRIT

I. The Tenth Circuit's Opinion Directly Conflicts with Opinions of the First, Third, Sixth and Ninth Circuits regarding considering abstention, sua sponte, and Abstention is Contrary to Legislative Intent of § 104 of the Indian Child Welfare Act, 25 U.S.C. 1914.

The decision below wherein the Tenth Circuit held that it may, sua sponte, consider the doctrine of abstention, is in direct conflict with decisions of the First, Third, Sixth and Ninth Circuits. As the Tenth Circuit acknowledged in its opinion the First Circuit held, in *Shannon v. Telco Communications, Inc.*, 824 F.2d 150, 151-2 (1st Cir. 1987), because the state did not press the abstention issue before the court of appeals, the court properly addressed the merits of the appeal; the Third Circuit held, in *Winston v. Children and Youth Services*, 948 F.2d 1380 (3rd Cir. 1991), cert. denied, 504 U.S. 956 (1992), "A party who wishes a federal court to abstain from deciding a live controversy in deference to a pending state action must preserve its claim in both the district court and the court of appeals."; the Sixth Circuit held, in *Universal Amusement Co. v. Vance*, 587 F.2d 159, 163 n.6 (6th Cir. 1978), *aff'd* 445 U.S. 308 (1980) (per curiam), "[a]ppellant did not raise the question of *Younger* abstention, and that issue, being non-jurisdictional, is thus not before this court."; and the Ninth Circuit held, in *Walnut Properties, Inc. v. City of Whittier*, 861 F.2d 1102, 1106 (9th Cir. 1988), that it declined to address abstention issue because the issue

was not raised until a second appeal from the district court and after an earlier remand from the U.S. Supreme Court.

Abstention is not a jurisdictional issue and must be preserved in the district court and the court of appeals, otherwise, the issue is waived.

The Tenth Circuit then addressed whether abstention should be invoked in the below Indian Child Welfare case.

The Tenth Circuit acknowledged that the district court had jurisdiction over Morrow's petition pursuant to 25 U.S.C. § 1914. *Roman-Nose v. New Mexico Dep't of Human Services*, 967 F.2d 435, 437 (10th Cir. 1992). However, the Tenth Circuit held that "We do not believe that Congress envisioned § 1914 to authorize the type of federal court supervision into ongoing state adoption proceedings that Morrow asks us to impose." App. A at 23a.

Effectively, the Tenth Circuit has eliminated federal enforcement of the Indian Child Welfare Act except by direct appeal to this Court after exhaustion of state appeals. The Tenth Circuit held, in *Kiowa Tribe of Okla. v. Lewis*, 777 F.2d 587, 590-92 (10th Cir. 1985), *cert. denied*, 479 U.S. 872 (1986), that § 1914 may not be used to challenge the legality of a state custody determination *after* a final decision has been made in the state court.

Chief Judge Seymour dissenting in the below opinion stated that "the majority's proposal to require abstention until that final decision has been made will in essence strip section 1914 of any meaningful application whatsoever." The impact of the Tenth Circuit's opinion is

widespread and harmful to American Indians and their federally recognized tribes and nations. Although the Tenth Circuit acknowledged federal court jurisdiction under § 1914 pursuant to *Roman-Nose*, it has for all practical purposes repealed § 1914 for one-fourth of the Indian population in this country. According to the 1990 U.S. Census, there were 470,278 Indians residing in and seventy-seven federally recognized Indian tribes or nations located within the Tenth Circuit.[2]

The holding of the Tenth Circuit is contrary to legislative intent of the Act. In the first section of the I.C.W.A., 25 U.S.C. § 1901, Congress found:

> (3) that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the **United States has a direct interest, as trustee,** in protecting Indian children who are members of or are eligible for membership in an Indian tribe;
>
> (4) **that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies** and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions; and

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[2] 1990 U.S. Census, American Indian Report; Bureau of Indian Affairs Directory of American Indian tribes and nations, Federal Register, Nov. 13, 1996, Vol. 61, No. 220. Following are the number of federally recognized tribes by state: Colorado, 3; Kansas, 4; New Mexico, 23; Oklahoma, 40; Utah, 5; and Wyoming, 2.

> (5) that the **States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people** and the cultural and social standards prevailing in Indian communities and families. (emphasis added.)

The declared policy of the I.C.W.A. is set forth in 25 U.S.C. § 1902:

> The Congress hereby declares that it is the policy of this Nation to protect the best interest of Indian children and to promote the stability and security of Indian tribes and families by the **establishment of minimum Federal standards** the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing assistance to Indian tribes in the operation of child and family service programs. (emphasis added).

Congress imposed upon state courts minimum Federal standards because Congress found that state courts were allowing "abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes." *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32, (1989). Implicit in state court proceedings is the fact that judges are more familiar and comfortable in applying state adoption law which, as in this case, is often inconsistent with the I.C.W.A. To enforce these federal standards in state court adoptions, Congress enacted § 1914 whereby the federal court may interdict and invalidate state placements in violation of §§ 1911, 1912 and 1913.

The black letter of § 1914 provides that an Indian parent may petition "any court of competent jurisdiction" to invalidate an Indian child placement. The Tenth Circuit acknowledged the federal district court to be a court of competent jurisdiction pursuant to § 1914. Without federal enforcement, these rights become hollow.

Congress restated in § 1901(3) its federal interest and *duty as trustee* to protect Indian children and their relationship to their tribe. This duty cannot be discharged by the federal courts by abstaining early in state court proceedings from hearing allegations of violations of the I.C.W.A. when the child is vulnerable, needs stability and is bonding with strangers. As this Court has pointed out, allowing an expeditious determination of whether the required Federal standards have been followed will avoid much potential anguish. *Mississippi Choctaw*, 490 U.S. 30, 53-54.

The federal interest in Indian child state adoption proceedings is evidenced clearly by the findings of Congress in § 1901, the stated purpose of the I.C.W.A. by Congress in § 1902 and the imposition of federal standards to remedy past state court abuses. The federal interest expressed in the I.C.W.A. is paramount to a state interest in the traditional area of adoptions. The Tenth Circuit found that family relations are a traditional area of state concern which demonstrated a sufficient state interest that the abstention doctrine should be applied. However, the Tenth Circuit failed to recognize it was against the background of the abuse of this traditional area of state concern as applied to Indian children that the Congress enacted the I.C.W.A. and superseded state law. Must Congress, as trustee, in declaring an urgent

need for the enactment of the I.C.W.A. meet the judicially legislated test of *Younger* abstention? Legislative intent and sound public policy says no.

It is presumed that Congress understood the doctrine of abstention when it enacted § 1914 and would not have enacted such an enforcement provision had it intended to permit federal courts to abstain. Abstention is hostile to the intent, purpose and design of the I.C.W.A. To ask the state courts to police themselves for enforcement of federal standards designed to remedy past abuses would be like asking "the fox to guard the henhouse."

CONCLUSION

The real underlying question is, does Congress, particularly in its role as trustee, have the right to enact laws and expect their enforcement by federal courts? In other words, is the judicial doctrine of abstention of greater force and control than direct legislation by Congress?

For the foregoing reasons, the petition for writ of certiorari should be granted.

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APPENDIX A

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

ROBERT LLOYD MORROW, Plaintiff-Appellant, v. THE HONORABLE DAVID WINSLOW; JOHN DOE; and JANE DOE, Defendants-Appellees. CHEROKEE NATION and CAROL GRANT, Intervenors.	)	No. 95-5182 (Filed Aug. 23, 1996)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA (D.C. No. 95-C-429-B)

Submitted on the briefs:

Chadwick Smith, Tulsa, Oklahoma, for Plaintiff-Appellant.

Michael E. Yeksavich, Tulsa, Oklahoma, for Defendants-Appellees.

Luke Goodwin, Tulsa, Oklahoma, for Intervenor Carol Grant.

Before **SEYMOUR**, Chief Judge, **HOLLOWAY** and **BRISCOE**, Circuit Judges.

HOLLOWAY, Circuit Judge.

Plaintiff-Appellant Robert Lloyd Morrow appeals from the district court's order denying him injunctive and declaratory relief on his complaint challenging Oklahoma adoption proceedings concerning his Indian child as violative of his rights under the Fourteenth Amendment Due Process Clause and the federal Indian Child Welfare Act. Morrow claimed there was subject matter jurisdiction below pursuant to 28 U.S.C. §§ 1331 and 1343(a)(3), and 42 U.S.C. § 1983, and the Indian Child Welfare Act, 25 U.S.C. § 1901, et seq. (ICWA).[1]

I

Plaintiff-Appellant Morrow is an "Indian" as defined by 25 U.S.C. § 1903(3) (a citizen of the Cherokee Nation) and the biological father of Credence Monroe Grant born September 29, 1994 to Carol Grant, a non-Indian and Morrow's former wife. The boy Credence is an "Indian

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[1] After examining the briefs and appellate record, this panel has determined that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(f); 10th Cir. R. 34.1.9. We therefore accept submission on the briefs as the parties have suggested.

Child" as defined by 25 U.S.C. § 1903(4) of the ICWA. Defendant-Appellee David Winslow is an Oklahoma state district judge in Tulsa County who presided over adoption proceedings regarding Credence and Defendant-Appellees John and Jane Doe, the prospective adoptive parents.

During the first trimester of her pregnancy (winter 1994) Carol Grant decided she wanted to place her unborn child for adoption. She desired an open adoption where she and her 15-year-old son could maintain contact with the child. Carol contacted a Cherokee Nation adoption specialist and a private adoption agency for help in the adoption process. Through these services Carol decided, prior to the birth of Credence, to place her child with the Does.

In February 1994 and again in June 1994, Morrow was contacted regarding the adoption. He told the adoption agency representative that while he did not favor the adoption, he would not fight it. Credence was born on September 29, 1994 and was placed with the Does. On October 12, 1994, the Does filed their petition to adopt Credence in the Oklahoma state district court in Tulsa County. This petition was accompanied by an application for a determination that Robert Morrow's consent to the adoption was not necessary.

Also on October 12 Carol Grant gave her consent to the adoption of Credence by the Does before defendant Judge Winslow. Plaintiff Morrow never executed a written consent to the child's placement. Judge Winslow set a hearing for November 4, 1994 to determine whether plaintiff's consent was necessary for the adoption. At that

hearing Morrow for the first time objected to the adoption and termination of his parental rights. On November 15, 1994, Morrow filed a counterclaim in the state proceeding, requesting custody of Credence. On November 15, 1994, Morrow also filed a motion to dismiss the Does' adoption petition on the grounds of failure to comply with the federal ICWA and the Oklahoma Indian Child Welfare Act. I App. at 91, 95.

On December 9, 1994, Morrow filed a motion to transfer the adoption proceedings to the Cherokee Nation District Court in Tahlequah. On January 9, 1995, the Cherokee Nation filed a motion to intervene, which was granted. Carol Grant objected to the transfer to the Cherokee tribal court, and the state court overruled the motion to transfer on January 25, 1995.

The original trial date in the state adoption case, December 16, 1994, was continued numerous times, but finally reset for May 17, 1995. However, on May 11, 1995, Morrow filed this suit in the United States District Court for the Northern District of Oklahoma, and the May 17 trial date for the state adoption case was stayed that day by the state judge, pending the federal proceedings.

In his complaint in federal court, Morrow named as defendants Judge Winslow and John and Jane Doe, the prospective adoptive parents. Morrow sought a temporary and permanent injunction enjoining the defendants "from continuing their policy, practice, custom or usage of non-compliance with the Indian Child Welfare Act. . . ." II App. at 306 (Complaint, ¶ 7). In addition he sought a declaratory judgment on these questions:

> [1] Whether the Defendants have violated due process of law by the Fifth and Fourteenth Amendments of the U.S. Constitution by failing to comply with the ICWA, by denying Plaintiff custody or visitation with his minor child, and by denying Plaintiff a timely hearing to protect his parental interest and bonding with the minor child.
>
> [2] Whether the provisions of the ICWA supersede Oklahoma law regarding rights of unwed fathers pursuant to 10 O.S.A. § 60.6(3).

Id. at ¶ 8.

After answers were filed, an evidentiary hearing was held in federal court on June 30, 1995, on which date a partial stipulation of facts was filed. On July 31, 1995, the federal district judge entered an order denying all relief to plaintiff Morrow, and granting judgment in favor of defendants John and Jane Doe and Judge Winslow and against Morrow and the Cherokee Nation. In that ruling, the district judge concluded "that under the ICWA and the OICWA Carol Grant had standing to and did timely object to the transfer of this case to the tribal court." Judgment of July 31, 1995 at 4, ¶ 12.

The federal judge's order addressed the merits of plaintiff Morrow's constitutional claims and held that "there has been no showing that the state court proceeding, and the Honorable David Winslow presiding, has and/or have denied Plaintiff Robert Lloyd Morrow and the Plaintiff/Intervenor, Cherokee Nation, due process in the adoption matter of minor child Credence Monroe Grant, nor is there any showing that such a denial of due process in [sic] imminent." The court therefore denied all

relief. Morrow appeals from this judgment. The Cherokee Nation does not appeal.

After the instant appeal was commenced, the state adoption court considered the matter of whether Morrow's consent to the adoption was necessary. A trial on this issue was held on October 16, 1995. On December 1, 1995, the state adoption judge entered an order discussing Morrow's contentions and concluding that his consent was not necessary for the adoption. After submission of this appeal on the briefs in March 1996, on June 27, 1996, on our own motion, we ordered the parties to submit supplemental memoranda advising us of the current status of the state adoption proceeding and addressing two questions: (1) if an adoption order has been entered in that proceeding, what are the positions of the parties as to whether dismissal of this federal suit should be ordered under the doctrine of *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923), *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983), and *Doe v. Pringle*, 550 F.2d 596 (10th Cir. 1976), *cert. denied*, 431 U.S. 916 (1977); and (2) if the state adoption proceeding is still pending, whether we should vacate and remand, directing abstention by the federal district court under the rationale of *Younger v. Harris*, 401 U.S. 37 (1971), and *Moore v. Sims*, 442 U.S. 415 (1979).

The supplemental memoranda of the parties were filed in July 1996 and we are advised that following the state adoption judge's December 1, 1995 order finding that plaintiff-appellant Morrow's consent was not necessary for the adoption, the second stage of the state adoption proceeding was completed on December 16, 1995. The appellees' memorandum says that the state judge

resolved the second stage of the adoption against Morrow, determining that the adoption was in the best interest of the child and should be finalized on December 13, 1995; that no written memorialization of this ruling has been filed; and that there is a pending motion to settle the terms of the order so that the actual decree of adoption had not been entered when appellees' supplemental memorandum was filed July 17, 1996. Plaintiff-Appellant Morrow's supplemental memorandum filed July 19, 1996, essentially agrees on the status of the state adoption case, but adds that it was Morrow who on April 19, 1996 filed the motion to settle the journal entry of judgment and that a hearing on this matter was set for July 19, 1996. The clerk of the state district court informs us that no judgment has been entered as of August 12, 1996.

We have considered the parties' memoranda and their previously submitted briefs. For reasons that follow, we conclude that we should direct abstention. Because we conclude that abstention is appropriate we do not reach the *Rooker-Feldman* question. *See Owens-Corning Fiberglas Corp. v. Moran*, 959 F.2d 634, 635 (7th Cir. 1992) (rather than attempting "a problematic application of the *Rooker-Feldman* doctrine," the court applied abstention principles and refused to issue an injunction to enjoin pending state litigation on the grounds that principles of federalism and comity would be upset).

II

A

A threshold question we face is whether we may raise the abstention issue ourselves since it was not raised

below. Of course, abstention has now been addressed in the parties' supplemental memoranda filed in July 1996 as our order of June 27, 1996 directed. Plaintiff-Appellant Morrow's supplemental memorandum argues that abstention should not be applied because the state adoption case here is private litigation, with neither the State nor any State agencies being parties. The Defendants-Appellees' supplemental memorandum says that if the case is not to be dismissed under the *Rooker* principle, which appellees first favor, abstention under *Younger v. Harris* and *Moore v. Sims* should be applied since otherwise Morrow would be permitted to pursue a second avenue of review and litigation he already has pursued in the state proceeding, producing chaos.

We are persuaded that we correctly raised the abstention question *sua sponte* and that we should weigh carefully the considerations relevant to abstaining. We are mindful that the Supreme Court has held that abstention may be waived. In *Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.*, 477 U.S. 619, 626 (1986), the Court said:

> A State may of course voluntarily submit to federal jurisdiction even though it might have had a tenable claim for abstention. *See Brown v. Hotel Employees*, 468 U.S. 491, 500, n. 9 (1984); *Ohio Bureau of Employment Services v. Hodory*, 431 U.S. 471, 479-480 (1977); *Sosna v. Iowa*, 419 U.S. 393, 396-397, n. 3 (1975). But in each of these cases the State *expressly* urged this Court or the District Court to proceed to an adjudication of the constitutional merits. We think there was no similar consent or waiver here, and we therefore

address the issue of whether the District Court should have abstained from deciding the case.

Our court has also said that the *Younger* abstention argument may be waived. In *Association of Community Organizations for Reform Now v. Municipality of Golden, Colorado*, 744 F.2d 739 (10th Cir. 1984), we concluded that under the circumstances of that case we should not invoke the *Younger* doctrine: "We conclude that the City of Golden has voluntarily submitted to a federal forum, and therefore 'principles of comity [underlying the *Younger* abstention doctrine] do not demand that the federal court force the case back into the State's own system.' " 744 F.2d at 742-43 n.2 (citation omitted).[2]

During the state court hearing on May 17, 1995 in the instant case, the date on which the state trial was set, Morrow's attorney advised the state judge that he had on file a motion to stay the state proceedings. Counsel for the intervening natural mother then stated he was ready

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[2] *See also Walnut Properties, Inc. v. City of Whittier*, 861 F.2d 1102, 1106 (9th Cir. 1988) (declining to address abstention issue because issue was not raised until second appeal from district court and after earlier remand from Supreme Court), *cert. denied*, 490 U.S. 1006 (1989); *Shannon v. Telco Communications, Inc.*, 824 F.2d 150, 151-52 (1st Cir. 1987) (because state did not press the abstention issue before court of appeals, court addressed merits of appeal); *Universal Amusement Co. v. Vance*, 587 F.2d 159, 163 n.6 (5th Cir. 1978) ("[a]ppellant did not raise the question of Younger abstention, and that issue, being non-jurisdictional, is thus not before this court."), *aff'd*, 445 U.S. 308 (1980) (per curiam); *but see Federal Express v. Tennessee Public Service Comm'n*, 925 F.2d 962, 966 (6th Cir.), (noting in dictum that the Supreme Court has indicated that abstention may be raised by the court *sua sponte*), *cert. denied*, 502 U.S. 812 (1991).

for trial, but that he understood the court's logic in not commencing any trial at that time and in passing the case to a date subsequent to the federal court's review. I App. at 294. Counsel for the adoptive parents said that he was in the same position as the mother's counsel; that he was torn by the wisdom of going to trial in the state court; and that he would just as soon dispose of the federal case as a practical matter before returning to state court. *Id.* Nevertheless, we feel we should address the abstention issue *sua sponte*.

In *Bellotti v. Baird*, 428 U.S. 132, 143 n.10, (1976), the Court noted "the fact that the full arguments in favor of abstention may not have been asserted in the District Court does not bar this Court's consideration of the issue."[3] The Court also stated: "Indeed, it would appear

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[3] The strongest statement suggesting that a party *must* raise abstention is found in *Winston v. Children and Youth Services*, 948 F.2d 1380 (3rd Cir. 1991), *cert. denied*, 504 U.S. 956 (1992). There the majority concluded that "[a]bstention, unlike mootness, does not present a jurisdictional issue. A party who wishes a federal court to abstain from deciding a live controversy in deference to a pending state action must preserve its claim in both the district court and the court of appeals." *Id.* at 1384. The majority concluded that the abstention issue was not preserved properly and therefore was waived. *Id.* at 1385.

Judge Garth, in dissent, concluded that the majority ignored circuit precedent in refusing to reach the merits of the abstention issue in the absence of a proper cross-appeal. *Id.* at 1397-98 (Garth, J., dissenting). He concluded that the federal court should have abstained in light of the ongoing state custody proceedings. *Id.* at 1398 ("Under the circumstances present here, a federal court should not intrude in the state processes involving family custody issues, but rather, should abstain."). We disagree with the *Winston* majority opinion and are persuaded by Judge Garth's cogent dissent.

that abstention may be raised by the court *sua sponte*." *Id.* at 144 n.10. In addition, the Court recently noted that "federal courts have the power to refrain from hearing cases that would interfere with a pending state criminal proceeding, *Younger v. Harris*, 401 U.S. 37 (1971), or with certain types of state civil proceedings, see *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975); *Juidice v. Vail*, 430 U.S. 327 (1977). . . . " *Quackenbush v. Allstate Insurance Co.*, 116 S. Ct. 1712, 1721 (1996). In *Quackenbush* the Court noted that "it has long been established that a federal court has the authority to decline to exercise its jurisdiction when it 'is asked to employ its historic powers as a court of equity'. . . . " *Id.* (quoting *Fair Assessment in Real Estate Ass'n, Inc. v. McNary*, 454 U.S. 100, 120 (1981) (Brennan, J., concurring)). The Court went on to say:

> Though we have thus located the power to abstain in the historic discretion exercised by federal courts "sitting in equity," we have not treated abstention as a "technical rule of equity procedure." [Citation omitted]. *Rather, we have recognized that the authority of a federal court to abstain from exercising its jurisdiction extends to all cases in which the court has discretion to grant or deny relief.*

Quackenbush, 116 S. Ct. at 1721-22 (emphasis added).

We are convinced that we have properly raised the abstention issue *sua sponte*. Therefore, we will consider whether abstention is appropriate in these circumstances.

B

Younger v. Harris involved the indictment of Harris in a California state court for alleged violations of the California Criminal Syndicalism Act. After his indictment, Harris filed suit in federal district court to enjoin the state district attorney from proceeding with the prosecution on the ground that the California act violated his First and Fourteenth Amendment rights to free speech and press. A three-judge district court found that the California act violated Harris's constitutional rights and enjoined his prosecution. The Supreme Court reversed, concluding that the injunction violated "the national policy forbidding federal courts to stay or enjoin pending state court proceedings except under special circumstances." 401 U.S. at 41. The Court said:

> This underlying reason for restraining courts of equity from interfering with criminal prosecutions is reinforced by an even more vital consideration, the notion of "comity," that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. This, perhaps for lack of a better and clearer way to describe it, is referred to by many as "Our Federalism," and one familiar with the profound debates that ushered our Federal Constitution into existence is bound to respect those who remain loyal to the ideals and dreams of "Our Federalism."

Id. at 44.

Younger abstention has also been applied in cases involving state civil proceedings. In *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975), the Court vacated a federal injunction against enforcement of a state judgment insofar as it closed a theater as a nuisance for showing obscene films which had not been adjudged obscene in prior adversary hearings. The Court held that *Younger* principles applied even though the state proceeding was civil in nature; it said the state procedure there was more akin to a criminal prosecution than most civil cases; and the Court said that federalism considerations, if anything, weighed more heavily toward federal restraint where injunctive relief was sought against state judicial proceedings than where relief against executive officers was sought. *Id.* at 603-04. The Court also held that the federal plaintiff should not be permitted the luxury of federal litigation of issues presented by ongoing state proceedings. *Id.* at 605. The court said that a party must exhaust his state appellate remedies before seeking a federal injunction unless he can bring himself within one of the exceptions in *Younger*. *Id.* at 609, 611. Those exceptions are (1) if the state proceeding is motivated by a desire to harass or is conducted in bad faith; (2) if the challenged statute is flagrantly violative of express constitutional prohibitions in every clause and paragraph thereof, or (3) if extraordinary circumstances exist. *Phelps v. Hamilton*, 59 F.3d 1058, 1063-64 (10th Cir. 1995). We find that from the record before us, and in the supplemental memoranda of the parties addressing *Younger* abstention, none of these *Younger* exceptions is shown to exist here.

We are mindful, however, that the Supreme Court itself has cautioned that *Younger* abstention is the exception rather than the rule:

> "When a Federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction. . . . The right of a party plaintiff to choose a Federal court where there is a choice cannot be properly denied." *Willcox v. Consolidated Gas Co.*, 212 U.S. 19, 40 (1909) (citations omitted).

New Orleans Public Service, Inc. v. Council of New Orleans, 491 U.S. 350, 358-59 (1989) (hereinafter *NOPSI*).

We must be observant of these teachings in *NOPSI*. We nevertheless do not feel that they require that we dismiss the forceful reasoning and applications of *Younger*. The Court has instructed us that *"Younger . . . and its progeny espouse a strong federal policy against federal court interference with pending state judicial proceedings absent extraordinary circumstances."* *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 431 (1982) (emphasis added). In *Middlesex* the Court also made it clear that the "policies underlying *Younger* are fully applicable to noncriminal judicial proceedings when important state interests are involved." *Id.* at 432. It cannot be gainsaid that adoption and child custody proceedings are an especially delicate subject of state policy, the Court stating that "[f]amily relations are a traditional area of state concern." *Moore v. Sims*, 442 U.S. 415, 435 (1979). The Court further noted in *Moore* that the doctrine of *Younger*, "which counsels federal court abstention when there is a pending state proceeding, reflects a strong policy against federal intervention in state judicial processes in the

absence of great and immediate irreparable injury to the federal plaintiff." *Moore*, 442 U.S. at 423.

In *Moore* the Texas Department of Human Resources had instituted a suit for emergency protection of three children under the Texas Family Code. After various state proceedings, the children's parents brought suit in federal district court where a three-judge court held part of the Texas Family Code unconstitutional and enjoined the pending state proceedings under the Code. The Supreme Court reversed, holding that *Younger* abstention was appropriate because of the traditional area of state concern for family relations. 442 U.S. at 434-35.

In sum, there are persuasive reasons for applying abstention in this case under the Supreme Court's precedents. There do remain, however, some additional questions which we should address before reaching a conclusion on applying abstention here. We turn now to these questions.

C

1

First, Morrow claims federal court jurisdiction under § 104 of the Indian Child Welfare Act, 25 U.S.C. § 1914. Section 1914 provides:

> Any Indian child who is the subject of any action for foster care placement or termination of parental rights under State law, any parent or Indian custodian from whose custody such child was removed, and the Indian child's tribe may petition any court of competent jurisdiction to invalidate such action upon a showing that such

> action violated any provision of sections 1911, 1912, and 1913 of this title.

Section 1914 appears to authorize the type of suit Morrow brought in the federal district court; and thus the statute arguably conflicts with the application of abstention by evincing a policy for federal adjudication of Morrow's case. We must therefore look to the intent and purpose of the ICWA to determine the scope of § 1914.

In the first section of the ICWA, 25 U.S.C. § 1901, Congress found

> (3) that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe;
>
> (4) that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions; and
>
> (5) that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.

The declared policy of the ICWA is set forth in 25 U.S.C. § 1902:

> The Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive home which will reflect the unique values of Indian culture, and by providing assistance to Indian tribes in the operation of child and family service programs.

The Supreme Court has noted that the ICWA "was the product of rising concern in the mid-1970's over the consequences to Indian children, Indian families, and Indian tribes of abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes." *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32 (1989). Evidence presented in Senate hearings showed that 25 to 35% of all Indian children had been separated from their families and placed in adoptive families, foster care, or institutions. *Id.;* H.R. Rep. No. 1386, 95th Cong., 2d Sess. 9 (1978), *reprinted in* 1978 U.S.C.C.A.N. 7530, 7531 (hereinafter "House Report"). In *Holyfield* the Court said:

> The ICWA thus, in the words of the House Report accompanying it, "seeks to protect the rights of the Indian child as an Indian and the rights of the Indian community and tribe in retaining its children in its society." House Report, at 23. It does so by establishing "a Federal policy that, where possible, an Indian child should remain in the Indian community," *ibid.*, and by making sure that Indian child welfare

> determinations are not based on a "white middle-class standard which, in many cases, forecloses placement with [an] Indian family." *Id.*, at 24.

490 U.S. at 37.

Thus, both the Court and Congress have made clear that the ICWA is intended to protect the rights of Indian children and tribes. As part of this protection, § 1914 allows a petition to invalidate a state court foster care placement or termination of parental rights action on the grounds that it violated §§ 1911, 1912, or 1913, to be brought in *any* court of competent jurisdiction. We have held that federal district courts have jurisdiction under 28 U.S.C. § 1331 over complaints in which a plaintiff alleges a violation of §§ 1911, 1912, or 1913. *Roman-Nose v. New Mexico Dep't of Human Services*, 967 F.2d 435, 437 (10th Cir. 1992). Morrow alleged violations of §§ 1912 and 1913, and therefore, under § 1914 and *Roman-Nose*, we believe there is jurisdiction to hear Morrow's claims in either federal or state court since those courts fall within the definition of "any court of competent jurisdiction" in § 1914.[4]

---

[4] We note that some state courts have held that § 1914 provides a cause of action only for parents from whose custody the child is removed. *See In the Matter of the Adoption of a Child of Indian Heritage*, 543 A.2d 925, 935-36 (N.J. 1988); *In re Adoption of Baby Boy L.*, 643 P.2d 168, 175-76 (Kan. 1982); *In Interest of S.A.M.*, 703 S.W.2d 603, 608 (Mo. Ct. App. 1986). These courts have read the phrase "from whose custody such child was removed" as modifying both the phrase "Indian custodian" and "any parent." Under this interpretation of § 1914, the Indian child's parent could bring a suit only if the child was removed from the parent's custody. Some of these courts have also held that "custody" refers to physical rather than legal custody. *See In re*

This does not answer our abstention question, however, because it is not clear from the language of § 1914 that Congress intended to allow federal courts to enjoin ongoing state adoption proceedings. Because of this uncertainty, it is appropriate to look to the legislative history of the ICWA. *See United States v. Abreu*, 962 F.2d 1447, 1450 (10th Cir. 1992) ("[w]hen the plain language of [a] statute does not unambiguously reveal its meaning,

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Adoption of Baby Boy L., 643 P.2d at 175-76 (suggesting that "custody" in § 1914 means physical control); *In Interest of S.A.M.*, 703 S.W.2d at 608 (same). We believe these cases incorrectly interpret § 1914 in light of the ICWA's broad purpose to protect the rights of Indian children, parents and tribes.

It is unclear whether the phrase "from whose custody such child was removed" modifies "any parent." Therefore, we look to the legislative history. In its section-by-section analysis, the House Report notes: "Section 104 [25 U.S.C. § 1914] authorizes the child, parent, or Indian custodian, or the tribe to set aside any foster care placement or termination of parental rights on the grounds that the rights secured under [25 U.S.C. §§ 1911, 1912, or 1913] were violated." House Report at 23, 1978 U.S.C.C.A.N. at 7546. This statement does not indicate whether "from whose custody such child was removed" is intended to modify "any parent." However, because the purpose of the statute is to protect the rights of Indian parents, children and tribes, we believe the interpretation which is more protective of those rights is the more appropriate interpretation. The more restrictive interpretation that "from whose custody such child was removed" modifies "any parent" is contrary to this protective purpose, so we reject that interpretation and conclude that "any parent" stands alone, unmodified by the phrase "from whose custody such child was removed." Therefore, § 1914 provides a cause of action for Morrow without regard to whether or not Credence was removed from his custody.

we turn to the legislative history"), *vacated on other grounds*, 508 U.S. 935 (1993) (mem.).

The House Report notes:

> *While the committee does not feel that it is necessary or desirable to oust the States of their traditional jurisdiction over Indian children falling within their geographic limits*, it does feel the need to establish minimum Federal standards and procedural safeguards in *State* Indian child custody proceedings designed to protect the rights of the child as an Indian, the Indian family and the Indian tribe.

House Report at 19, 1978 U.S.C.C.A.N. at 7541 (emphasis added). This statement indicates that "the ICWA establishes 'minimum Federal standards and procedural safeguards in State Indian child custody proceedings designed to protect the rights of the child as an Indian, the Indian family and the Indian tribe.' " *Kiowa Tribe of Oklahoma v. Lewis*, 777 F.2d 587, 590 n.3 (10th Cir. 1985), *cert. denied*, 479 U.S. 872 (1986); it does not indicate, however, that the ICWA intended to allow federal court interdiction of *ongoing* state custody disputes involving Indian children.

While § 1914 grants "any court of competent jurisdiction," and thus a federal as well as state court, authority to consider a challenge to foster care placements and terminations of parental rights, we do not believe that preemptive federal collateral attacks, such as Morrow's,

are what Congress intended to permit in § 1914.[5] Instead, we believe that § 1914 and related provisions of the ICWA do not preclude our consideration of abstention.[6]

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[5] The dissent concludes that in the circumstances of Morrow's case, § 1914 permits his collateral attack in federal court against the ongoing state adoption proceeding and prevents application of abstention principles by us. As noted in Part I, *supra*, in November 1994 Morrow alleged, in the state proceeding, failure of the state adoption petition to comply with the federal and state Indian Child Welfare Acts and thus he was there pressing his ICWA claims well *before* bringing his second front attack on May 11, 1995, in federal court by the instant suit, which also alleged his ICWA claims. II App. at 306. We do not believe the ICWA supports such a proliferation of litigation which would run counter to the purpose of expeditious determination of Indian child custody that *Mississippi Band of Choctaw Indians v. Holyfield* favors. 490 U.S. at 53-54.

In the circumstances before us, we are persuaded that the federal ICWA should be construed as providing its minimum federal standards, as § 1902 notes, but that the statute does not indicate "that it is necessary or desirable to oust the states of their traditional jurisdiction over Indian children," in the words of the House Report. Where the Indian parent's ICWA claims have already been asserted in the state court of competent jurisdiction, they can be vindicated there and we need not disregard the policy of abstention which can also be accommodated so as to avoid duplicitous and protracted litigation.

[6] These statutory provisions provide a broad spectrum of protective measures for the benefit of Indian children, their parents, and the tribes:

Section 1911 provides for exclusive tribal jurisdiction over child custody proceeding involving an Indian child who resides or is domiciled within the tribal reservation (except where such jurisdiction is vested in the state by existing federal law) (§ 1911(a)); transfer of foster care placement or termination of parental rights proceedings from state to tribal court under

Younger's principles of comity and federalism would be disregarded by allowing federal court intervention into

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certain circumstances for Indian children not domiciled or residing within the reservation (§ 1911(b)); the right of the tribe, parent, custodian, or child, to intervene in state court foster care or termination proceedings (§ 1911(c)); and full faith and credit to the public acts, records and judicial proceedings of any Indian Tribe applicable to Indian child custody proceedings to the extent provided in § 1911(d).

Section 1912 provides for notice by the state court in an involuntary proceeding to the tribe, and the parent or custodian (§ 1912(a)); appointment of counsel to indigent parents or custodians in removal, placement, or termination proceedings (§ 1912(b)); right of access to reports and documents filed with the court (§ 1912(c)); that the party seeking to effect foster care placement or termination of parental rights satisfy the court that remedial and rehabilitative efforts to prevent the breakup of the Indian family have been made and that those efforts proved unsuccessful (§ 1912(d)); that no foster care placement may be ordered in the absence of clear and convincing evidence, including expert testimony, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child (§ 1912(e)); that no termination of parental rights may be ordered in the absence of proof beyond a reasonable doubt, including expert testimony, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child (§ 1912(f)).

Section § 1913 provides minimum standards for obtaining valid voluntary consent of a parent or Indian custodian to a foster care placement or to termination of parental rights (§ 1913(a)); that withdrawal of consent to foster care placement may be made at any time (§ 1913(b)); that withdrawal of consent to termination of parental rights may be made at any time prior to entry of a final decree of termination or adoption (§ 1913(c)); that withdrawal of consent to termination of parental rights up to two years after an adoption decree (and longer if allowed by

ongoing state court proceedings here. And, if federal court intervention was allowed it could result in numerous delays as multiple, piecemeal federal litigation worked its way through the federal courts. Here, the state proceedings were stayed by the state judge pending the federal district court proceedings. Since the state proceedings resumed, there have been a number of substantial developments in the state case. We do not believe that Congress envisioned § 1914 to authorize the type of federal court supervision into ongoing state adoption proceedings that Morrow asks us to impose.

Thus we are persuaded that § 1914 does not prevent full consideration of the abstention doctrine.

2

Second, Morrow argues that abstention is inappropriate because the state adoption case is private litigation, with neither the State nor any of its agencies being a party. Appellant's Supplemental Memorandum at 6. Morrow relies on *Miofsky v. Superior Court*, 703 F.2d 332 (9th Cir. 1983), *inter alia*.

Pennzoil Co. v. Texaco, Inc., 481 U.S. 1 (1987), is pertinent to the argument Morrow makes because there the Court applied *Younger* abstention in a case where the state was not a party. Pennzoil brought suit in Texas state court and recovered a total judgment which, with prejudgment interest, would exceed $11 billion. Under Texas

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state law) may be made if the consent was obtained through fraud or duress (§ 1913(d)).

law Pennzoil would have been able to commence enforcement of the judgment unless Texaco could post a bond of more than $13 billion, which was not possible. Thus, Pennzoil would have been able to commence enforcement of the judgment before Texaco's appeal was resolved. Texaco brought suit in the United States District Court for the Southern District of New York alleging that the Texas proceedings would result in violation of the federal Constitution and various federal statutes. The district court issued the injunction, which the Second Circuit affirmed.

The Supreme Court reversed, concluding that *Younger* abstention was required. The Court pointed out that it did not hold that *Younger* abstention is always appropriate when civil proceedings were pending in a state court;[7]

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[7] In *Schall v. Joyce*, 885 F.2d 101 (3d Cir. 1989), the Third Circuit applied *Younger* to a constitutional challenge to Pennsylvania's confession of judgment procedures. At the time of the federal suit, the plaintiff was also involved in state proceedings to set aside a judgment entered against her by confession. The federal district court stayed the federal suit pending the resolution of the state proceedings.

The Third Circuit affirmed, applying *Younger*. The majority concluded that *Pennzoil* applied, and that abstention was therefore appropriate because of the state's interest in enforcing the orders and judgments of its courts. 885 F.2d at 109-10. The court concluded that although the state judgment at issue was *ex parte*, this was no basis for concluding that the state interest was any weaker than it was in *Pennzoil*. *Id.* at 109. The majority in *Schall* stated, however, that "the state's interest in litigation between private persons is less weighty than other state interests protected by *Younger*," and, therefore, "federal courts may, in an appropriate case, interfere with an ongoing privately initiated state proceeding in which the state court has not yet rendered judgment even if *Younger* would preclude such

the Court said that as in *Juidice v. Vail*, 430 U.S. 327 (1977), it relied on the State's interest in protecting the authority of the judicial system so that its orders and judgments were not rendered nugatory. *Pennzoil*, 481 U.S. at 14 n.12. The Court added that both *Juidice* and *Pennzoil* involved challenges to the processes by which the state compels compliance with the judgments of its courts. *Id.* at 13-14. While private litigation was involved, due to such interest of the state in the litigation, abstention was applied, the injunctive order was reversed and the case was remanded for dismissal.

We are satisfied that the circumstances before us demonstrate a sufficient state interest that here also the abstention doctrine should be applied. The Supreme Court has made emphatically clear its recognition that "[f]amily relations are a traditional area of state concern." *Moore v. Sims*, 442 U.S. at 435. The state judge who was presiding in the adoption proceeding was named as a defendant. It is that judge who has a special obligation in connection with the judicial administration of the proceeding in the best interest of the child. The state, although not a party, obviously has an interest in the orderly conduct of the proceedings in its courts in a

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interference in a case in which the state has already entered a judgment." 885 F.2d at 109.

We must follow *Middlesex County Ethics Comm.*, 457 U.S. at 432 which instructed that "policies underlying *Younger* are fully applicable to noncriminal judicial proceedings when important state interests are involved." We believe that, under *Middlesex County* and *Pennzoil*, *Younger* is applicable when important state interests are involved even if there is no state court judgment whose enforcement is sought.

manner which protects the interests of the child and the family relationship. In *Huffman v. Pursue, Ltd.*, the Court said that interference with the state judicial proceeding prevented effectuation not only of state substantive policies, "but also [prevented the state] from continuing to perform the separate function of providing a forum competent to vindicate any constitutional objections interposed against those policies." 420 U.S. at 604. We feel these factors demonstrate that here abstention is clearly favored, and that we should not permit "the luxury of federal litigation of issues presented by ongoing state proceedings," *Huffman*, 420 U.S. at 605, which involve family relations, a traditional area of state concern. *Moore v. Sims*, 442 U.S. at 435.

We are not persuaded that *Miofsky v. Superior Court*, 703 F.2d 332 (9th Cir. 1983), supports Morrow's objection to abstention here. In *Miofsky*, an anesthesiologist was a defendant in numerous civil actions filed by former patients. The plaintiffs in those actions scheduled depositions of psychiatrists who had examined Miofsky in connection with state criminal proceedings. Miofsky moved for a protective order to prohibit the witnesses from disclosing information about him in their depositions. After the California trial and appellate courts denied the relief sought by Miofsky, he brought a § 1983 action in a federal district court, alleging unconstitutional infringement of his privacy interests, *inter alia*. The Ninth Circuit held that federal jurisdiction did exist and that *Younger* did not require dismissal on abstention grounds, noting the unflagging obligation of the federal courts to exercise their jurisdiction.

We are satisfied that the state interest in the underlying civil litigation in *Miofsky* was substantially less than it is here where a traditional area of state concern for family relations is implicated. We do not find *Miofsky* persuasive on the *Younger* question before us.

In sum, we reject the contention that the absence of the state as a formal party justifies disregarding the abstention doctrine where the recognized state interest in the state's adoption proceeding is apparent.

3

In light of the precedents of the Supreme Court we have reviewed, we are convinced that the circumstances before us call for application of the abstention doctrine. Plaintiff-Appellant Morrow participated in the state adoption proceeding and continues to participate there. In November 1994, Morrow asserted claims of violations of the federal ICWA and the Oklahoma Indian Child Welfare Act. We feel that the ongoing state proceeding does "afford an adequate opportunity" to raise the ICWA and constitutional claims of Morrow, *Moore v. Sims*, 442 U.S. at 430, and there is no showing of a procedural bar against his assertion of those claims. We are persuaded that "*Younger* . . . and its progeny espouse a strong federal policy against federal court interference with pending state judicial proceedings absent extraordinary circumstances." *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. at 431. *Quackenbush* instructs us that the Court has "recognized that the authority of a federal court to abstain from exercising its jurisdiction extends to all cases in which the court has discretion to grant or

deny relief." 116 S. Ct. at 1722. We are convinced that this is such a case and that the circumstances before us counsel abstention.

Accordingly, we **VACATE** the district court's judgment on the merits of Morrow's claims which denied injunctive and declaratory relief. We **REMAND** the case to the district court with directions to abstain and to dismiss Morrow's case without prejudice.

SEYMOUR, Chief Judge, dissenting:

I am satisfied that the federal district court correctly resolved the merits of Mr. Morrow's claims under the Indian Child Welfare Act (ICWA), 25 U.S.C. § 1901 *et seq.*, and I would therefore affirm on that basis. For the reasons set out below, I am unable to agree with the majority's decision to require abstention under *Younger*. Accordingly, I must dissent.

I do not agree with the majority's conclusion that the State's interest here is sufficient to support abstention in the face of the strong federal interest Congress has expressed in the welfare of Indian children. The majority states at page 23 of its opinion that family relations are a traditional area of state concern, quoting *Moore v. Sims*, 442 U.S. 415 (1979). In *Moore*, the State was a party, contrary to the situation here. Moreover, and more significantly, *Moore* did not involve an Indian child, a distinction that I view as critical given the Congressional statements set out in the ICWA. "Because of the unique legal status of Indians in American jurisprudence, legal

doctrines often must be viewed from a different perspective from that which would obtain in other areas of the law." *Native Village of Venetie I.R.A. Council v. Alaska*, 944 F.2d 548, 553 (9th Cir. 1991).

I do not believe we can assign the State's interest in providing a forum for determining the custody of an *Indian child* the requisite weight for abstention purposes in light of the Congressional finding in the ICWA that "the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, *have often failed to recognize* the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families." 25 U.S.C. § 1901(5). To remedy this failing by the States, Congress declared:

> "It is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families *by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture.*"

Id. § 1902. Congress has thus imposed Federal standards on custody disputes involving Indian children which override an otherwise traditional area of state concern precisely because the States have not been sensitive to the unique circumstances arising when the custody of Indian children is involved. In my judgment, these Congressional pronouncements clearly indicate that the federal interest is paramount here, and I therefore cannot agree

that the State's interest is sufficient to support a decision to abstain.

Because the whole purpose of the ICWA is to set out these standards and impose them on the States as a matter of federal law, I must also disagree with the majority's statements at page 19 that Congress did not intend section 1914 of the ICWA to allow a federal suit challenging the legality of an ongoing state custody determination of an Indian child. The majority cites no authority for that proposition and it is, of course, directly contrary to the canon of construction that "[s]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985); *see also Native Village of Venetie*, 944 F.2d at 548. Section 1914 authorizes any competent court to invalidate the custody placement of an "Indian child who is the subject of any action for foster care placement or termination of parental rights under State law" when the action violates enumerated provisions of the ICWA. Removing an Indian child from the custody of a parent or Indian custodian frequently occurs during such proceedings and long before a final disposition of the case is made. Nothing in the language of the statute or its legislative history provides any support for the majority's conclusion that this removal cannot be challenged until a final order in the underlying action is entered. Indeed, the plain intent of the statute appears to me to be to the contrary. As the Supreme Court has pointed out, allowing an expeditious determination of whether the required Federal standards have been followed will avoid much potential anguish. *See Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30,

53-54 (1989). Moreover, given our holding in *Kiowa Tribe of Okla. v. Lewis*, 777 F.2d 587, 590-92 (10th Cir. 1985), *cert. denied*, 479 U.S. 872 (1986), that section 1914 may not be used to challenge the legality of a state custody determination *after* a final decision has been made in the state courts, the majority's proposal to require abstention until that final decision has been made will in essence strip section 1914 of any meaningful application whatsoever.

Abstention is only warranted in civil proceedings when "the State's interests in the proceedings are so important that exercise of the federal judicial power would disregard the comity between the States and the National Government." *Pennzoil Co. v. Texaco, Inc.* 481 U.S. 1, 11 (1987). Here, Congress has found that States have often failed to recognize federal concerns when conducting the civil proceedings at issue. Congress has therefore mandated Federal standards for use in such proceedings. Congress has further provided an enforcement mechanism through section 1914 to ensure that the State proceedings comply with these Federal standards. Given the clear Congressional statements that federal concerns are paramount in these proceedings, we are not at liberty to hold otherwise.

I would affirm on the basis of the district court's correct resolution of the merits.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

ROBERT LLOYD MORROW,
Plaintiff-Appellant,
and
THE CHEROKEE NATION,
Plaintiff-Intervenor,
v.
DAVID HONORABLE DAVID WINSLOW, Judge of the District Court, of Tulsa County, State of Oklahoma; JOHN DOE, prospective adoptive parent; JANE DOE, prospective adoptive parent,
Defendants-Appellees,
and
CAROL DERONE GRANT,
Defendant-Intervenor.

No. 95-5182

ORDER

Filed October 22, 1996

Before SEYMOUR, Chief Judge, PORFILIO, ANDERSON, TACHA, BALDOCK, BRORBY, EBEL, KELLY, HENRY, BRISCOE, LUCERO, and MURPHY, Circuit Judges.

The Court, in order to correct clerical errors in the issuance of this order dated October 2, 1996 reissues it nunc pro tunc and is to read as follows:

This matter comes on for consideration of appellant's petition for rehearing and suggestion for rehearing en banc.

Upon consideration thereof, the petition for rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the petition for rehearing with suggestion for rehearing en banc was transmitted to all judges of the court in active service. The court in having been polled on the suggestion for rehearing en banc pursuant to Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied. Chief Judge Seymour and Judges Anderson, Ebel, Henry, Lucero and Murphy voted to grant rehearing.

Entered for the Court

PATRICK FISHER, Clerk

/s/ Trish Carara
Trish Carara
Deputy Clerk

Supreme Court, U.S.
FILED
FEB 20 1997
CLERK

No. 96-1139

In The

Supreme Court of the United States

October Term, 1996

ROBERT LLOYD MORROW,

Petitioner,

and THE CHEROKEE NATION,

Plaintiff-Intervenor,

v.

THE HONORABLE DAVID WINSLOW, Judge of the District Court of Tulsa County, State of Oklahoma, JOHN AND JANE DOE prospective adoptive parents,

Respondents,

and

CAROL DERONE GRANT,

Respondent-Intervenor.

On Petition For Writ Of Certiorari To The Tenth Circuit Court Of Appeals

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RESPONSE TO PETITION FOR WRIT OF CERTIORARI

Respondents, John and Jane Doe, the adopting parents, and the Honorable David Winslow, Judge of the District Court of Tulsa County, Oklahoma, pray that this Honorable Court deny Petitioner's request for a Writ of Certiorari. This adoption case involves the interpretation of Oklahoma Supreme Court decisions and legislation rather than federal law and has been tried by Petitioner to a conclusion in state court where the decision was adverse to Petitioner. The Petitioner has appealed the state trial court decision to the Supreme Court of Oklahoma where it is pending. The Respondents demonstrated in federal court and in state court that there has been no actionable violation of the Indian Child Welfare Act, the Oklahoma Indian Child Welfare Act or of any other applicable law. Petitioner, being unhappy with the results in state court, where he has fully participated and has adequate remedies which he is currently seeking, only attempts by the request for certiorari to involve federal courts in the day-to-day operations and minutia of state court adoption proceedings. States have a substantial interest in the well being of all children within their borders and state courts are the most appropriate forums in which to litigate adoptions. Additionally Counsel for Petitioner is precluded at this time under Oklahoma law from engaging in the private practice of law.

OPINIONS BELOW

See Petitioner's Appendix setting forth the decision of the Tenth Circuit reported at 94 F.3d 1386. Petitioner also has an appeal pending in the Oklahoma Supreme Court in a case styled In the Matter of the Adoption of CMG, case number 88,553.

STATEMENT OF THE CASE

Petitioner is the father of the child the respondent adopting parents adopted. Carol Derone Grant is the mother of the child and the Honorable David Winslow was the state trial court judge before whom the adoption was filed. Months before the child was born Petitioner advised he would not oppose adoption and Cherokee Nation specifically approved adoption by the Respondent parents. Only after the child was born, placed with Respondents and adoption proceedings begun did Petitioner and Cherokee Nation dispute the adoption. Petitioner literally attacked the entire adoption process and centered the Indian issues around amendments made to the Oklahoma Indian Child Welfare Act. Petitioner asserted that the state amendments abolished prior Oklahoma case decisions rendering the adoption improper under the Oklahoma Indian Child Welfare Act and the Indian Child Welfare Act.

After full participation in the state court proceeding up to literally the week before the case was set for trial the Petitioner and Cherokee Nation filed their collateral attack in Federal District Court where the trial court

found no violation. That decision was appealed by Petitioner, but not by Cherokee Nation, to the Tenth Circuit where the case was returned to District Court for dismissal. The case proceeded to trial in state court where the Honorable David Winslow recused himself and the case was heard by another judge. After a complete evidentiary trial the state court ruled against the Petitioner and Cherokee Nation. The Petitioner, but not Cherokee Nation, appealed the state trial court decision to the Oklahoma Supreme Court where it is now pending. Additionally, the state trial court has disqualified Petitioner's attorney from further participation in proceedings in the state trial court and a motion to disqualify Petitioner's attorney is pending in the Oklahoma Supreme Court.

REASONS FOR DENYING THE WRIT

I.

THE FUNDAMENTAL ISSUE IN THIS CASE IS INTERPRETATION OF OKLAHOMA LAW.

The case of *Matter of Adoption of Baby Boy D*, 742 P.2d 1059 (Okla. 1985), cert den., 484 U.S. 1072, established in Oklahoma what is often referred to as the Indian family doctrine of the Indian Child Welfare Act, 25 U.S.C.A. § 1901 et seq. This case is squarely within the doctrine of the *Baby Boy D* case which is contrary to Petitioner's assertions. See also *In the Matter of the Adoption of DMJ*, 741 P.2d 1386 (Okla. 1985).

In 1994 the Oklahoma Legislature made amendments to the Oklahoma Indian Child Welfare Act, 10 O.S.A. § 40.1 et seq. Petitioner claims the amendments abolished the holding in the *Baby Boy D* case and from that he argued that what had been proper under the doctrine would now be a violation of both the Indian Child Welfare Act and the Oklahoma Indian Child Welfare Act. Whether or not Oklahoma legislation eliminated the *Baby Boy D* doctrine is a question for the Oklahoma Supreme Court.

Petitioner has sought and still seeks his remedy in state court but attempts to interject the federal courts into a super review process of state adoptions. Petitioner within the state review process has open to him an appeal to this Court but only after the appropriate state court has determined the effects of a change in state law.

II.

PETITIONER IS PRECLUDED FROM SEEKING REVIEW IN THIS COURT AT THIS STAGE OF THE STATE COURT PROCEEDINGS

Petitioner has fully participated in the state court proceedings in a process involving several hearings as well as separate evidentiary trials on whether or not he had a right to consent to adoption and whether or not finalization of the adoption was in the child's best interests. In all instances the trial court found against the father and he has filed an appeal with the Oklahoma Supreme Court seeking review of the legal and factual issues. Petitioner's filing in federal District Court was

simply a collateral attack on the state court and his seeking review in this Court is only a continuation of the collateral attack. If the father is unhappy with the decision of the Oklahoma Supreme Court he may then seek review in this Court.

III.

ABSENTIA IS APPROPRIATE WHEN PARTICIPATION AND REMEDIES HAVE BEEN AFFORDED AND ARE AVAILABLE IN STATE COURT

Adoption law is a matter of individual state law and concern and involves a factual determination of a child's best interests and the fitness of adopting parents. The Indian Child Welfare Act allows intervention and participation in adoption cases involving Indian children by parents and Indian Nations. However, that involvement is but a part of the larger potentially complicated factual picture of the child's best interests and the adopting parties' fitness.

The Petitioner and Cherokee Nation were never denied a right to participate and present evidence in the state adoption case. In fact they had every opportunity to do so and actively and aggressively did participate. This would be a different situation if Petitioner were denied the right to be heard. If the federal courts do not abstain under circumstances when full participation is afforded the complaining party in state court, and he has and continues pursuing full and adequate remedies in state court then chaos could be created. How in depth would federal review be in an adoption case? Will this Court review home studies of Indian families? Will this Court

review which of competing parties in an adoption is most "Indian?" Absentia can prevent legal chaos, forum shopping and make for judicial efficiency. *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923); *Younger v. Harris*, 401 U.S. 37 (1971); and *Moore v. Sims*, 442 U.S. 450 (1979).

IV.

PETITIONER'S ATTORNEY IS DISQUALIFIED FROM ENGAGING IN THE PRIVATE PRACTICE OF LAW.

During the course of the state trial the Office of the Public Defender of Tulsa County, Oklahoma represented the child, Petitioner's attorney represented the father and Ms. Lisa Frasier represented Cherokee Nation. Prior to submission of the Petition for Certiorari both Mr. Smith and Ms. Frasier became full time employee attorneys of the Office of the Public Defender as Assistant Public Defenders. On January 16, 1997, the state trial court disqualified Mr. Smith from further representation of the Petitioner in the trial court. Mr. Smith and Ms. Frasier continue as full time Assistant Public Defenders for Tulsa County, Oklahoma.

Oklahoma law, 19 O.S.A. § 138.4, specifically prohibits full time Assistant Public Defenders from engaging in any practice of law except in his or her performance of duties as an Assistant Public Defender. Not only is Mr. Smith now a full time employee of the very entity that represented the child in the litigation, by pursuing this appeal he is clearly violating the statute. This cannot be allowed.

Further, Rule 1.11 of the Oklahoma Rules of Professional Conduct prohibits a lawyer serving as a public officer or employee from participating in a matter in which the lawyer participated personally and substantially while in private practice except as law may otherwise expressly permit. The applicable statute, 19 O.S.A. § 138.4, makes no exception for Assistant Public Defenders to engage in the private practice of law nor does it allow them to ignore the Rules of Professional Conduct. In pursuing this appeal Mr. Smith is violating rules of professional conduct.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectively submitted,

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Supreme Court, U.S.
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No. 96-1139

In The

Supreme Court of the United States

October Term, 1996

ROBERT LLOYD MORROW,

Petitioner,

and THE CHEROKEE NATION,

Plaintiff-Intervenor,

v.

THE HONORABLE DAVID WINSLOW, Judge of the District Court of Tulsa County, State of Oklahoma, JOHN AND JANE DOE prospective adoptive parents,

Respondents.

and

CAROL DERONE GRANT,

Respondent-Intervenor.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REPLY TO RESPONSE FOR PETITION FOR WRIT OF CERTIORARI

I. THE FUNDAMENTAL ISSUE BEFORE THE COURT IS NOT AN INTERPRETATION OF OKLAHOMA LAW BUT A QUESTION OF FEDERAL ABSTENTION.

Respondents argue that the fundamental issue before the Court is a question of state law involving the "Indian family" exception to application of the Indian Child Welfare Act, 25 U.S.C. § 1901. That is not the question decided by the Tenth Circuit or brought to the Court. The issue presented for review is whether or not the federal courts should abstain from hearing allegations of violation of the Indian Child Welfare Act where there is a pending state court adoption. The Tenth Circuit did address in a footnote and rejected the "Indian family" exception created by the Oklahoma Supreme Court in *Matter of Adoption of Baby Boy D*, 742 P.2d 1059 (Okla. 1985). See footnote number 4, *Morrow v Winslow and John and Jane Doe*, 94 F.3d 1386, (10th Cir. 1996), Appendix A to Petition for Writ of Certiorari, page 18a. Therefore, contrary to the assertions of Respondents, the "Indian family" exception is not an issue before the Court.

II. PETITIONER IS NOT PRECLUDED FROM SEEKING REVIEW IN THIS COURT.

Respondents cite no authority for their bold proposition that Petitioner may not seek review of the instant Tenth Circuit decision regarding abstention. This proposition should be discarded summarily because the question decided by the Tenth Circuit regarding abstention in Indian Child Welfare Cases is one of legal precedence and

important public concern and policy especially in Indian country and with Indian children and parents.

III. ABSTENTION IS NOT PROPER IN INDIAN CHILD WELFARE CASES.

Respondents wholly fail to address the fundamental issue before the Court and the Tenth Circuit, i.e., did Congress intend for the federal courts to invoke the judicially created doctrine of abstention when it enacted 25 U.S.C. § 1914.

Respondent state court judge and adopting parents illustrate in their Response the belief and the actual practice in state court that state adoption law is paramount to federal law and the protections of the Indian Child Welfare Act are subordinate to state law. It is telling that Respondents failed to address the legislative interpretation and substantive arguments advanced by Petitioner.

Respondents argue that if the federal courts accept jurisdiction under 25 U.S.C. § 1914 then chaos could be created in the state courts. Congress understood the impact of the Indian Child Welfare Act on state courts when it enacted the act and especially when it provided in § 1914 a remedy for any court of competent jurisdiction to set aside child placements made in violation of the act. In fact, it is because states, pursuant to local law, placed other interests paramount to Indian and federal interests did Congress enact the Indian Child Welfare Act.

The Court should grant certiorari because abstention would severely limit timely enforcement of the Indian Child Welfare Act contrary to legislative intent.

IV. PETITIONER'S ATTORNEY IS NOT DISQUALIFIED FROM ENGAGING IN THE PRIVATE PRACTICE OF LAW

Respondents wholly failed to raise this issue before the Tenth Circuit and are precluded from asserting the issue before the Court. *Oklahoma Tax Commission v. Chickasaw Nation*, 115 S.Ct. 2214, 2219 (1995). Respondents fail to advise this Court that the Oklahoma Supreme Court has deferred this issue in a related appeal styled in the Matter of the Adoption of CMG, case number 88,553 until after the decisional stage of the appeal.

Further, under Oklahoma law, Respondents have waived any objection to Petitioner's attorney representation in this pro bono case by timely failing to object. See *Alexander v Smith*, 173 P.2d 648, (Okl. 1918); *Eden v Beaman*, (Okl. 1934), 30 P.2d 899, 900; *Pryor v State*, (Okl. 1934), 38 P.2d 923, 924; *Kane v Ferguson*, (Okl. 1945), 157 P.2d 195, 198.

CONCLUSION

An important issue of public concern and policy is before the Court and it should grant certiorari. Congress intended the enforcement of the federal Indian Child Welfare Act by allowing parties to seek relief by any court of competent jurisdiction pursuant to 25 U.S.C. § 1914. Without federal enforcement of the federal rights protected by the Indian Child Welfare, those rights are subordinated to a hostile tide of state law which was the reason for enactment in the first place.

The Court should grant certiorari.

Respectfully submitted,

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